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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Shasta)

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH WILLIAM DUNCAN,

Defendant and Appellant.

C059317

(Super. Ct. No.
07F1593)

Based on evidence of defendant Joseph William Duncan's attack on Judith Schmidt, a jury convicted him of attempted kidnapping, attempted carjacking, and two counts of assault with a deadly weapon. The jury also found that in the course of committing the attempted kidnapping and the carjacking, defendant used a knife. Defendant was sentenced to state prison for seven years six months.

On appeal, defendant contends (1) the trial court abused its discretion in denying his motion for a new trial, (2) reversal of one of the counts of assault is required because only one assault occurred, and (3) his sentence must be reversed because imposing it pursuant to Senate Bill No. 40 violated the

ex post facto and due process clauses of the federal Constitution. We shall affirm the judgment.

FACTS

During the spring of 2005 defendant met and became romantically interested in Judith Schmidt while they were attending Shasta Junior College. When Schmidt refused to date defendant, he became very angry, yelled about God, struck a wooden pillar with his fist, and told her they were supposed to be together. In November 2006 Schmidt became engaged and told Megan Albrightson, who was dating defendant.

On February 16, 2007, Schmidt was working at the Orchard Supply Hardware in Redding. About 9:20 p.m. she left work with fellow employee Theodore Lidgett. They walked to their cars, which were parked in the store's lot. Schmidt got into the driver's seat of her car, and before she could pull the door shut a man forced his way into the car through that door, ordered and pushed her into the passenger seat, and demanded her car keys. The man was about 5 feet 10 inches to 6 feet tall; wore wire-rimmed glasses and a dark-colored mask that covered his face; had a muffled voice; wore a dark grey hooded sweatshirt, blue jeans, and leather gloves; and carried a backpack. He had a bicycle cable wrapped around his wrist and held a hunting knife with a silver handle and serrated blade.

The man put the knife to Schmidt's throat, but she managed to open the passenger door and drop her keys to the ground. She asked the man to get out of the car, but he said no. Schmidt began screaming for help and the man put his hand in her mouth

to stop her. Lidgett came to the passenger's side of the car and the man told him to "get the F away or else I'll cut her throat." Lidgett pushed the knife away, grabbed Schmidt's jacket by the shoulders, and began pulling her from the car. The man grabbed Schmidt's jacket, tried to pull her back into the car, and stabbed her in the leg when she began kicking. As Schmidt was pulled from the car, she fell to the ground; she had cuts on her face, leg, lips, and tongue.

The man came around to the passenger side but was kept at bay by Lidgett's repeatedly hitting him with the passenger door. The man eventually left on foot in a southerly direction.

A police canine unit arrived. The dog picked up a scent in the direction the man had fled and tracked him to a grove of trees approximately one-quarter mile away. At the base of one of the trees officers found a backpack containing a "survival-type knife," a neoprene ski mask, a bicycle cable, a pair of Mechanix gloves, and surgical scissors. Although Lidgett was unable to identify the backpack, he told the police that the knife, mask, and cable looked like those of the assailant.

Defendant's car and home were searched pursuant to a warrant on February 22 and February 28, 2007. Among the items found were a gray hooded sweatshirt, a gray jacket, an electronic voice changer, wire-rimmed glasses, a black neoprene mask/scarf, a new pair of neoprene Mechanix gloves, an empty Winchester knife box, a metal dog leash, two new metal dog collars, an unopened box of condoms, disposable cameras, six-inch nails, and an acetylene torch.

DNA samples were obtained from defendant and from Schmidt. Six DNA samples were taken from the ski mask that police found in the backpack. Defendant's DNA matched the profile of the major contributor of the DNA found on the mask. Schmidt could not be excluded as the minor contributor of some of the DNA obtained from the mask.

Statistical analysis predicted that the random chances for another match of the major contributor were 1 in 120 trillion for a Caucasian, 1 in 100 trillion for an African-American, and 1 in 200 trillion for an Hispanic. Similarly, the random chances for another match of the minor contributor were 1 in 550 billion for a Caucasian, 1 in 1.3 trillion for an African-American, and 1 in 9 trillion for an Hispanic. Defendant is Caucasian.

Defendant testified, admitting his infatuation with Schmidt but denying he was her assailant. Defendant testified that he had gone for a walk about 8:45 the evening of the assault and that he was punched and clubbed by a man, rendering him unconscious. Upon regaining consciousness, he returned to his car, where he passed out a second time. When next he regained consciousness, he called Albrightson and the two went to a movie. Defendant denied that the mask found in the backpack was his, and he did not know how the DNA came to be on that mask. Defendant testified that he had only owned one pair of Mechanix gloves; the backpack found in the orchard might be similar to the one he owned, but he did not believe it was his; the voice-changer was intended as a present for his son; the dog collars

were to be used as handles on a crate he was going to construct; the nails were for fixing his mother's fence and the hammer was to fix a broken seat; and that while he owned several knives, the one used on and identified by Schmidt did not look like any he owned.

DISCUSSION

I

Relying on *Griffin v. California* (1965) 380 U.S. 609 [14 L.Ed.2d 106] (*Griffin*) and *Doyle v. Ohio* (1976) 426 U.S. 610 [49 L.Ed.2d 91] (*Doyle*), defendant contends the trial court abused its discretion when it denied his motion for a mistrial because the prosecutor improperly used his silence in the custodial interview for impeachment and as affirmative evidence of guilt, and he improperly elicited the officers' opinion that defendant was guilty.

The People argue defendant has forfeited these arguments by his failure to object on the grounds set forth in *Griffin* and *Doyle*, but in any event, the court did not err. The People also urge that the challenged statements were admissible pursuant to the adoptive admission exception to the hearsay rule.

We conclude that defendant has forfeited his claims under *Griffin* and *Doyle* and that even if the claims were not forfeited, they lack merit. However, the court erred in finding and instructing the jury that defendant's statements could be considered as substantive evidence under the theory of adoptive admissions, but we find the error was harmless.

Defendant's contention arises as follows: defendant was detained pursuant to search warrants for his residence, his vehicle, and to obtain biological samples from him. The process took from three to four hours, during which defendant was also interviewed by several officers, including Officer Mellon. Defendant successfully moved to have statements he gave during the interview excluded because the officers had failed to advise defendant of his *Miranda* rights.¹ Defendant was also advised that if he chose to testify, the excluded statements could then be used to impeach his testimony.

On direct examination, defendant testified that during the interview Officer Mellon said words to the effect of, "I know you did it" and "Come on admit it," and that Mellon said he knew defendant was the person they were looking for. At that point, defendant was confused and replied, "[O]kay." Mellon told defendant that some of the items they had recovered would come back with defendant's DNA on them, and defendant again replied, "[O]kay."

Defendant's counsel asked defendant, "Did you ever deny the allegations in any fashion to Officer Mellon?" Defendant answered: "I never stated directly, 'No, I did not do it.' What I said was, after Officer Mellon and Officer Niver and Officer Ostrowski asked me several times to just give them an explanation of why I did it, I responded with, 'How am I

¹ *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694] (*Miranda*).

supposed to give them an explanation for something that my only knowledge of was from the newspaper?'"

On rebuttal, Officer Mellon testified that he told defendant, "'Based on information known to me I know you were involved in this assault that occurred at Orchard Hardware,'" and that defendant responded, "[O]kay." The prosecutor asked Mellon if he had "confront[ed defendant] with another one of [his] beliefs," Mellon answered, "Yes," and the prosecutor asked what that belief was. Defendant objected and the matter was discussed off the record.

Mellon continued to testify, stating that as an interviewing technique, he never directly asks a suspect whether he committed the offense because the suspect may then doubt that the interviewer actually believes the suspect is guilty. Instead, Mellon asked questions that would "portray to [the suspect] that I know you did this." Defendant never did tell Mellon, "I did not do this."

Later, the court addressed defendant's unreported objection. "I believe [defense counsel's] objection was that, in effect, the business of the officer's personal views about the defendant's guilt or innocence were being injected into trial. My belief and understanding is that the questions were being asked in a context in which the jury was being essentially given the platform, or frame of reference on which the answers attributed to the defendant could be assessed, and that that context was important in enabling them to understand the responses attributable to the defendant to these inquiries. [¶]

I did also, however, require that in future questioning, the prosecutor use the words 'accuse' or 'accusation' in formatting his questions to the investigating officer in reference to what was being recounted from that conversation, rather than the use of the word 'belief' or one of its derivations, to avoid the potential for the concerns raised by [defense counsel] and so the objections were overruled."

Defense counsel responded: "Yes. The Court has done a pretty good job of recapping, but in the interim I've been thinking about this. And not only did basically the prosecutor elicit, for lack of a better term, *Griffin* error, personal beliefs of the officer -- he not only did that, but he alluded to other evidence that was known to the officer and very well may have been kept out of this trial. He said, based on other information you received, wasn't it -- you know, you asked him about your belief that you thought he was guilty, something to that effect. That's not verbatim. [¶] But the combination of the belief and allusion to other evidence or other information is very inappropriate, and I would be making a mistrial motion."

The court denied the motion, stating that "[t]here are instructions which have been provided to the jury that assist them in understanding what they can use that section of testimony for, as it relates to the statement attributed to the defendant." Among these instructions were those relating to

"Adoptive Admissions" (CALCRIM No. 357) and "Failure to Explain or Deny Adverse Testimony" (CALCRIM No. 361).²

Forfeiture of *Griffin* and *Doyle* Error Issues

A defendant's failure to object in the trial court on the same ground for which he seeks appellate review forfeits that issue for appeal. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1124; Evid. Code, § 353.) Here, as shown below, defendant did not object on either of the grounds of error described in *Griffin* or *Doyle*. Hence, he forfeits those claims of error.

Griffin error occurs when either the prosecutor argues or the court instructs that the jury may draw an inference of guilt

² CALCRIM No. 357 states: "If you conclude that someone made a statement outside of court that accused the defendant of the crime and the defendant did not deny it, you must decide whether each of the following is true: [¶] 1. The statement was made to the defendant or made in his presence; [¶] 2. The defendant heard and understood the statement; [¶] 3. The defendant would, under all the circumstances, naturally have denied the statement if he thought it was not true; [¶] AND [¶] 4. The defendant could have denied it but did not. [¶] If you decide that all of these requirements have been met, you may conclude that the defendant admitted the statement was true. [¶] If you decide that any of these requirements has not been met, you must not consider either the statement or the defendant's response for any purpose."

CALCRIM No. 361 states: "If the defendant failed in his testimony to explain or deny evidence against him, and if he could reasonably be expected to have done so based on what he knew, you may consider his failure to explain or deny in evaluating that evidence. Any such failure is not enough by itself to prove guilt. The People must still prove each element of the crime beyond a reasonable doubt. [¶] If the defendant failed to explain or deny, it is up to you to decide the meaning and importance of that failure."

from a defendant's failure to testify. (*Griffin, supra*, 380 U.S. at p. 615 ["We . . . hold that the Fifth Amendment, in its direct application to the Federal Government, . . . by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."].)

Doyle error occurs where the prosecution uses a defendant's postarrest silence "to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his [or her] failure to have told the story after receiving *Miranda* warnings at the time of his [or her] arrest." (*Doyle, supra*, 426 U.S. at pp. 611, 619-620; *People v. Evans* (1994) 25 Cal.App.4th 358, 367.)

The record makes clear that defendant's objection was to Officer Mellon's testifying to his personal view of defendant's guilt and to Mellon's "allud[ing] to other . . . information [he had] received." Defendant cited *Griffin* as authority for the impropriety of Mellon's testimony about his belief in defendant's guilt. On this point defendant was simply mistaken, since neither *Griffin*, nor *Doyle* for that matter, have anything whatsoever to do with defendant's objection. Consequently, he may not raise for the first time on appeal the errors described by *Griffin* or *Doyle*.

Even if we were to consider defendant's claims of *Griffin* and *Doyle* error, we would reject them. There was no *Griffin* error because defendant took the stand and testified. There was

no *Doyle* error because defendant was not silent following his arrest.³

Adoptive Admission Error

The court instructed the jury on the theory of an adoptive admission (CALCRIM No. 357): "If you conclude that someone made a statement outside of court that accused the defendant of the crime and the defendant did not deny it, you must decide whether each of the following is true: one, the statement was made to the defendant or made in his presence; two, the defendant heard and understood the statement; three, the defendant would under all of the circumstances naturally have denied the statement if he thought it was not true; and four, the defendant could have denied it but did not."

It was error to give this instruction. The trial court had ruled that defendant's statements given during the police interview were obtained in violation of *Miranda* and therefore inadmissible in the People's case-in-chief. The People have not challenged this ruling. In *Richardson v. Marsh* (1987) 481 U.S. 200, 206-207 [95 L.Ed.2d 176], the court stated: "[I]n *Harris v. New York*, 401 U.S. 222 (1971), we held that statements elicited from a defendant in violation of *Miranda* . . . can be introduced to impeach that defendant's credibility, even though

³ Defendant's reliance on *United States v. Whitehead* (9th Cir. 2000) 200 F.3d 634 is misplaced. *Whitehead* does not mention *Doyle*; it involves *Miranda* error.

they are inadmissible as evidence of his guilt, so long as the jury is instructed accordingly.” (Italics added.)

Here, the court gave the required instruction—CALCRIM No. 356, entitled “Miranda Defective Statements.” This instruction provides: “You have heard evidence that the defendant made a statement to a peace officer. If you conclude that the defendant made this statement, you may consider it only to help you decide whether to believe the defendant’s testimony. *You may not consider it as proof that the statement is true, or for any other purpose.*” (Italics added.) The court immediately followed this instruction with CALCRIM No. 357 (*ante*, fn. 2) regarding adoptive admissions. The adoptive admissions, as argued by the prosecutor, were defendant’s answers of “okay” to the accusations made by Officer Mellon during the interview. Since these were found by the court to have been obtained in violation of *Miranda*, they could only be admitted to impeach defendant’s credibility, and were not admissible as substantive evidence of his guilt even if they were adoptive admissions.⁴

Nevertheless, we conclude the instructional error was harmless under any standard. Contrary to defendant’s assertion

⁴ The People’s reliance on *People v. Davis* (1954) 43 Cal.23 661, *People v. Fauber* (1992) 2 Cal.4th 792, *People v. Medina* (1990) 50 Cal.App.3d 870, and *People v. Preston* (1973) 9 Cal.3d 308, in support of their position that the adoptive admission instruction was proper, is misplaced. None of these cases involved, as here, statements suppressed by the trial court because of a *Miranda* violation. Consequently, these cases are inapposite.

that the "evidence against [him] was not overwhelming," the evidence was just that. A backpack was found in a grove of trees located in the direction defendant had fled and was about one-quarter mile from the scene of the assault. The backpack, which was similar to that carried by the assailant, contained a ski mask, knife, and bicycle cable that looked like those possessed by the assailant. In defendant's car, officers found a gray hooded sweatshirt and a gray jacket, each of which witnesses testified were similar to those worn by the assailant. Of no small consequence, and a fact defendant neglects to include in his argument for prejudice, are the astronomical odds (ranging from 1 in 550 billion to 1 in 200 trillion) against someone other than defendant and Schmidt being the donors of the DNA found on the mask in the backpack. Couple the foregoing evidence with defendant's fanciful alibi—while walking in a location other than where the assault was taking place and at the time of the assault, he was suddenly "sucker punched" by an unknown assailant who then clubbed him, rendering him unconscious, after which he regained consciousness but passed out again in his car, again regained consciousness, called his fiancée, and then attended a movie with her—the probability of defendant's not being convicted in the absence of the misinstruction is likewise astronomical. Hence, the error was harmless.

Eliciting Mellon's Opinion on Defendant's Guilt

Defendant argues it was improper to permit the prosecutor to argue that defendant was "not credible based on [Officer

Mellon's] personal opinion of the interview and that [defendant's] failure to deny was evidence of guilt based on the officer's years of experience as a police interrogator." Defendant misreads the record.

"A consistent line of authority in California as well as other jurisdictions holds a witness cannot express an opinion concerning the guilt or innocence of the defendant." (*People v. Torres* (1995) 33 Cal.App.4th 37, 46-47; *People v. Sergill* (1982) 138 Cal.App.3d 34, 39-40 [error to allow police officers, whether testifying as lay witnesses or as experts, to render an opinion on the defendant's guilt].)

The essence of defendant's argument is that Officer Mellon never asked defendant directly if he committed the offense but instead told defendant that he believed he committed the offense because of the evidence and other information the officers had, so that both Mellon's personal belief and his reference to other evidence could be told to the jury. We are not persuaded.

Officer Mellon explained that he never directly asked defendant whether he committed the offense for a very specific reason—"Because had I asked [defendant] 'Did you do it,' [it] would show or it might show him that I had some doubt on my part, and that's not what I wanted to portray to him. I wanted to portray to him that I know you did this."

It is patently clear from the record that rather than attempting to get his personal beliefs and other evidence before the jury, Mellon's questioning of defendant in the manner he did was a strategy he used to get defendant to confess to the crime.

Hence the jury, presumed to be comprised of persons with intelligence and common sense (*People v. Coddington* (2000) 23 Cal.4th 529, 594, overruled on a different point in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13), would not be misled as argued by defendant.

II

Defendant contends that one of the felony assault convictions, either count 3 or count 4, must be dismissed because the "knife to the throat and the stabbing were not separate offenses." We reject the contention.

"In California, a single act or course of conduct by a defendant can lead to convictions "of any number of the offenses charged." [Citations.]'" (*People v. Reed* (2006) 38 Cal.4th 1224, 1226-1227.) "[I]f the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for the independent violation committed in pursuit of each objective even though the violations were parts of an otherwise indivisible course of conduct." (*People v. Perez* (1979) 23 Cal.3d 545, 551.) "Whether the acts of which a defendant has been convicted constitute an indivisible course of conduct is a question of fact for the trial court, and the trial court's findings will not be disturbed on appeal if they are supported by substantial evidence." (*People v. Kwok* (1998) 63 Cal.App.4th 1236, 1252-1253.)

In an unreported discussion at the bench later explained by the court, defendant had moved to dismiss either count 3 or

count 4 based upon there being a single assault. The court denied the motion, stating: “. . . Counts 3 and 4 are separately charged as counts of assault with a deadly weapon. My review of the single-act body of cases tells me that for purposes of the dismissal motion, and irrespective of [Penal Code section] 654's application or non-application, there are two distinct events, even though the sequence of events is very fast evolving. [¶] They are not, for example, multiple stabbing motions, sort of Anthony Perkins in Psycho kind of bathroom scene, which is one event. Rather we have the use, according to the evidence, of a knife as a coercive device to compel compliance with directives involving two people. [¶] Then there's the intervening event of the effort to escape, accompanied by assistance from a Good Samaritan, which results, according to the evidence, in the use by the assailant of the knife and the stabbing motion to create injury. [¶] Both the interruption, due to the escape effort and the emergence on the scene of the Good Samaritan and the different uses to which the knife was put according to the evidence, leave me with the conclusion that we have two acts, which for purposes of [defense counsel's] motion, support two separate charges. So the motion as to Counts 3 and 4 will be denied.”

Schmidt testified that her assailant, clearly shown to have been defendant, forced his way into her car at knifepoint, placed the knife to her cheek, ordered and shoved her into the passenger seat, and demanded the keys. She was able to open the door and drop the keys on the ground. She also demanded that he

get out of the car. He refused, and when she attempted to get out he grabbed her to prevent her from doing so. At this time Lidgett arrived, grabbed Schmidt's shoulders, and tried to pull her from the car. Defendant did not let go; Schmidt began kicking, and as she was about to escape, defendant stabbed her in the leg.

From this evidence, the court could reasonably infer, as it did, that defendant's initial intent was to kidnap Schmidt without, at least at that point, harming her. When it became clear to defendant that Schmidt was going to escape, he formed a separate objective, which was to harm her by stabbing her in the leg. Consequently, substantial evidence supports the trial court's findings of "two distinct events, even though the sequence of events is very fast evolving."

Defendant claims this case is controlled by *People v Mitchell* (1940) 40 Cal.App.2d 204 and *People v. Oppenheimer* (1909) 156 Cal. 733. We disagree. Since both *Mitchell* and *Oppenheimer* were decided long before the rules regarding continuous course of conduct and independent objectives were formulated, neither case had occasion to discuss these rules.

III

Defendant contends that "[s]entencing a defendant with a jury right under *Cunningham v. California* (2007) [549 U.S. 270] [127 S.Ct 856, 166 L.Ed.2d 856] [*Cunningham*] at the time of his offense under Senate Bill No. 40 constitutes *Ex Post Facto* punishment and a denial of due process in violation of the federal Constitution." We disagree.

Defendant was sentenced to an unstayed term of seven years six months, calculated as follows: the upper term of four and one-half years for the attempted carjacking (the principal term) plus the upper term of three years for the use of a deadly weapon enhancement; the upper term of four years for the attempted kidnapping plus one year for the deadly weapon enhancement, that term stayed pursuant to Penal Code section 654; and the upper term of four years for each of the felony assaults, those terms to run concurrent to the principal term.

The court's reasons for selecting the upper term were that there was a threat of great bodily harm, the offense showed a high degree of cruelty, the manner of committing the offense showed planning and sophistication, and that he engaged in violent conduct. As a mitigating circumstance, the court recognized that defendant had no prior record but concluded that the "circumstances in aggravation, or any of them individually standing alone, outweigh those in mitigation"

Defendant committed his offenses in February 2007. In January 2007 the United States Supreme Court filed its decision in *Cunningham, supra*, 549 U.S. 270, which held that California's then-existing determinate sentencing law's (DSL) provision directing the court to "order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime (former § 1170, subd. (b)), violated a defendant's right to a trial by jury by permitting the judge, rather than

the jury, to find facts exposing the defendant to an elevated upper term." (*Cunningham*, at p. 274.)

Effective March 30, 2007, in response to *Cunningham*, the California Legislature passed Senate Bill No. 40 (hereafter SB 40; Stats. 2007, ch. 3, § 1). SB 40 amended Penal Code section 1170 by eliminating the middle term as the presumptive term and permitting a judge discretion to choose a term within the range so long as the judge stated reasons for that choice.⁵

In July 2007 the California Supreme Court rendered its opinion in *People v. Sandoval* (2007) 41 Cal.4th 825 (*Sandoval*). There, the court found that defendant had been sentenced in violation of *Cunningham* and the error was not harmless. (*Sandoval*, *supra*, 41 Cal.4th at pp. 832, 837-838, 843.) Because of doubt whether the Legislature had meant SB 40 to be retroactive in cases of resentencing, the court determined it would remand the defendant for resentencing under its own authority to fashion an appropriate sentencing scheme. (*Sandoval*, at pp. 845-846.) That sentencing scheme was one suggested by the Attorney General, which the court concluded was in compliance with the constitutional requirements of

⁵ As amended, Penal Code section 1170 now states, in relevant part: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. . . . The court shall select the term which, in the court's discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected" (§ 1170, subd. (b).)

Cunningham, was substantially indistinguishable from SB 40, and was applicable to the defendant, whose crimes were committed prior to July 19, 2007, the date of the *Sandoval* decision. (*Sandoval*, at pp. 845-846, 852, 857.)

Relying on *Miller v. Florida* (1987) 482 U.S. 423 [96 L.Ed.2d 351] (*Miller*), the *Sandoval* defendant argued that "resentencing her under a scheme in which the trial court has discretion to impose any of the three terms would deny her due process of law and violate the prohibition against ex post facto laws." (*Sandoval, supra*, 41 Cal.4th at p. 853.) In a detailed analysis, the court distinguished *Miller* and rejected the defendant's arguments, concluding that the scheme the Attorney General was suggesting, which the court was adopting, constituted a procedural change and did not increase the defendant's punishment.

Defendant committed his offenses in February 2007 and was sentenced in June 2008. Defendant asserts that because *Sandoval* involved a resentencing of a defendant originally sentenced under the DSL prior to its amendment by SB 40 and the present case involves defendant's being sentenced under SB 40, the *Sandoval* holdings are dicta. Then, relying on *Miller*, defendant proceeds to reargue the ex post facto and due process arguments rejected by *Sandoval*. (*Sandoval, supra*, 41 Cal.4th at pp. 853-858.)

Defendant's distinction between the sentencing "postures" of the two cases—initial sentencing vis-à-vis resentencing—is one without a difference. *Sandoval* pointed out the scheme it

was proposing, i.e., the one suggested by the Attorney General, and SB 40 was substantively indistinguishable. Consequently, by parity of reasoning, SB 40 complies with the constitutional requirements of *Cunningham* and does not violate ex post facto or due process concerns.

In sum, at the time defendant was sentenced he was entitled to be sentenced under a scheme that was constitutionally compatible with the requirements of *Cunningham*. This he received under SB 40, which *Sandoval* found to be substantially indistinguishable from the procedure it directed trial courts to use on resentencing.⁶

DISPOSITION

The judgment is affirmed.

RAYE, J.

We concur:

NICHOLSON, Acting P. J.

BUTZ, J.

⁶ The recent amendments to Penal Code section 4019 do not operate to modify defendant's entitlement to credit, as he was committed for a serious felony. (§ 4019, subds. (b) & (c); Stats. 2009, 3d Ex. Sess., ch. 28, § 50.)